COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000180-DR

DARRYL M. SAMUELS — APPELLANT

APPEAL FROM COURT OF APPEALS
NO. 2012-CA-000341

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HON. CRAIG Z. CLYMER, JUDGE
NO. 2008-CR-00377

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT DARRYL M. SAMUELS

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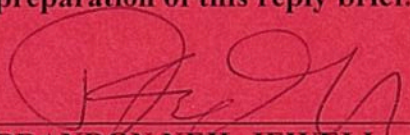
CERTIFICATE REQUIRED BY CR 76.12(6):

The Undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail, first class postage prepaid, on March 17, 2016: Hon. Craig Zeiss Clymer, Judge, McCracken County Courthouse, 301 S. Sixth Street, Paducah, Kentucky 42003; Hon. Seth A. Hancock, Assistant Commonwealth's Attorney, McCracken County Courthouse, Paducah, Kentucky 42003-1794; Hon. Wesley K. Boyarski, Assistant Public Advocate, Department of Public Advocacy, 503 North 16th Street, Murray, Kentucky 42071; the Hon. Andy Beshear, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601 and the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. The undersigned does also certify that the record on appeal was not removed from the office of the Clerk of the Court of Appeals of Kentucky for preparation of this reply brief.



BRANDON NEIL JEWELL

INTRODUCTION

This is a case on discretionary review of an opinion of a panel the Kentucky Court of Appeals in which the panel affirmed Mr. Samuels' conviction for second degree assault and sentence of ten years imprisonment.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Samuels believes oral argument could be useful because the issue in this case is whether it is a conflict for a DPA attorney in a local DPA trial office to represent a defendant in a criminal case while another DPA attorney in the same local DPA trial office represents someone with adverse interests in that same case on other criminal charges, and this issue has not been directly addressed hitherto.

CITATIONS TO THE RECORD

The record will be cited to in conformance with CR 98. There are two transcripts of record. One has "belated appeal" written on it and will be cited as "TR BA" and the other will be cited as "TR."

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This case involves whether a conflict existed when Mr. Samuels' public defender represented Mr. Samuels throughout his pretrial and trial proceedings while a public defender in the same local DPA[1] trial office represented the alleged victim in the case on other criminal charges through Mr. Samuels' pretrial period.[2]

The charges against Mr. Samuels in this case arose due to a fight that occurred in the McCracken County Jail. Mr. Samuels and the alleged victim, Christopher Gravett, were both detainees at the jail. One night, a dispute between Mr. Samuels and Mr. Gravett became physical. VR: 5/20/09; 12:00:11, 1:57:41. This resulted in Mr. Samuels being indicted on second degree assault. TR I, 1. Attorney Carolyn Keeley from the Paducah DPA trial office was appointed to represent Mr. Samuels. TR BA, 41.

On the morning of Mr. Samuels' trial, Ms. Keeley made a disclosure to the trial court concerning her local DPA office's representation of the alleged victim, Mr. Gravett. She informed the court that Mr. Gravett was also a local DPA client and that she believed he still was. VR 5/20/09; 8:46:21. The trial court then informed Mr. Samuels that, for the record, he wanted to make sure that Mr. Samuels understood that Mr. Gravett had been represented by the DPA, but not by this particular public defender. VR: 5/20/09; 8:46:31. Mr. Samuels' public defender then handed the trial court a piece of paper she referred to as a "disclosure" of the conflicts. VR: 5/20/09; 8:46:49. The disclosure revealed that the DPA Paducah trial office had represented Mr. Gravett on "numerous

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[1] Department of Public Advocacy.

[2] This local DPA office was the Paducah DPA trial office.

occasions."[3] It also revealed that at least two of the prosecution witnesses were represented by the same public defender representing Mr. Samuels.

Mr. Samuels' public defender requested that Mr. Samuels sign the paper and waive the conflict and noted that he refused to sign it. VR: 5/20/09; 8:47:00. Mr. Samuels was questioned by the trial court. While the recording is of poor quality and largely inaudible, it can be discerned that Mr. Samuels indicated that he believed the conflict would adversely affect his public defender's ability to try his case. VR: 5/20/09; 8:48:00. The trial court said there was no conflict and ordered the trial to proceed. VR: 5/20/09; 8:48:21.

At trial, a jury found Mr. Samuels guilty of second degree assault, recommended the maximum sentence of 10 years imprisonment, and the trial court followed the jury's recommendation in the final judgment. TR I, 96, 104-106.

The case was appealed to the Kentucky Court of Appeals as a matter of right and a panel rendered an opinion remanding the case to the McCracken Circuit Court for an evidentiary hearing to determine "if the two witnesses and victim were being actively

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[3] This document, entered into the record, read as follows:

> I, Darryl Samuels, am represented by the Paducah Trial Office of the Department of Public Advocacy. My assigned attorney from that office is Carolyn Keeley. I am awaiting trial on McCracken Circuit Court on Indictment No. 08-CR-0000377 for Assault 2nd. The victim in that case is Christopher Gravett. I am aware that the Paducah Trial Office has represented Gravett on numerous occasions. Most recently, Gravett was sentenced on April 8, 2009 in McCracken Circuit Court. His attorney was John Johnson, another attorney in the Paducah Trial Office of the Department of Public Advocacy.
>
> In addition, I am aware that at least two of the prosecution witnesses were represented by Carolyn Keeley. Because the incident occurred at the McCracken County Jail, some or all potential witnesses will have been clients of the Paducah Trial Office. The actual facts of the case are not at issue. My defense is either self-defense or that I was acting under extreme emotional disturbance.
>
> I have no objection to being represented by Carolyn Keeley, an attorney with the Paducah Trial Office of the Department of Public Advocacy.

represented by Samuels' defense counsel or the Paducah DPA in general and whether or not there was a conflict of interest." COA Opinion, pg. 4 (attached in appendix).

At the subsequent evidentiary hearing, the dates of the Paducah DPA trial office's representation of Mr. Samuels, Mr. Gravett, and prosecution witnesses Mr. Avery and Mr. Inghram[4] were agreed upon and were supported by court documents that were filed as exhibits. VR Supp: 9/23/11; 15:58:38, TR II, 19-23, 33, Commonwealth's Exhibit Nos. 1-5. The agreed upon prosecutor's timeline was as follows:

4/20/07	Gravett indicted in 07-CR-218 (represented by Paducah DPA – Audrey Lee)
7/05/07	Gravett guilty plea in 07-CR-218 (represented by Paducah DPA – Audrey Lee)
8/27/07	Gravett sentenced in 07-CR-218 (represented by Paducah DPA – Audrey Lee)
6/30/08	Gravett probation revocation in 07-CR-218 (represented by Paducah DPA – Sara Steele)
7/03/08	Samuels' preliminary hearing in McCracken District Court on other charges (would eventually become 08-CR-324) (Paducah DPA appointed)
7/09/08	Alleged assault occurs in the McCracken County Jail
8/01/08	Samuels charged with assault (the instant case)
8/08/08	Samuels indicted in 08-CR-377 (the instant case)
9/19/08	Samuels motion for Psychological Examination filed in 08-CR-377 & 08-CR-324 (filed by Paducah DPA – Carolyn Keeley) TR I, 4
1/05/09	Gravett's second probation revocation hearing in 07-CR-218 (represented by Paducah DPA – John Johnson)
1/09/09	Gravett indicted in 09-CR-008 (represented by Paducah DPA – John Johnson)

[4] Mr. Avery and Mr. Inghram were also detainees at the jail when the incident occurred.

1/20/09 Samuels pleads guilty in 08-CR-324 (represented by Paducah DPA – Carolyn Keeley)

3/18/09 Samuels is sentenced in 08-CR-324 (represented by Paducah DPA – Carolyn Keeley)

4/08/09 Gravett pleads guilty and is sentenced in 09-CR-008 (represented by Paducah DPA – John Johnson)

5/08/09 Gravett Motion for shock probation filed in 07-CR-218 and 09-CR-008 (represented by Paducah DPA – John Johnson)

5/12/09 Gravett Motion for shock probation is denied in 07-CR-218 and 09-CR-008

5/20/09 Samuels' trial in 08-CR-377 (represented by Paducah DPA – Carolyn Keeley)

Commonwealth's Exhibit Nos. 1-5; TR II, 19-22.

In the briefs filed in the trial court, defense counsel said there was a potential conflict with DPA's representation of Mr. Inghram and Mr. Avery but argued that the only conflict of concern was with Mr. Gravett. TR II, 33. However, the following timeline was agreed upon and is presented now to provide a complete picture.

1/04/08 Avery indicted in 08-CR-004 (represented by Paducah DPA – initially Todd Jones)

2/08/08 Inghram preliminary hearing on 08-F-119 (represented by Paducah DPA – Carolyn Keeley)

2/22/08 Avery is indicted in 08-CR-074 (represented by Paducah DPA – initially Todd Jones)

4/07/08 Avery enters guilty plea in 08-CR-004 and 08-CR-074 (represented by Paducah DPA – Carolyn Keeley)

6/26/08 Inghram pleads guilty to charges in District Court (represented by Paducah DPA)

8/25/08 Avery files shock probation motion in 08-CR-004 and 08-CR-074 (motions are filed by Paducah DPA – Carolyn Keeley)

9/02/08 Avery's shock probation motions in 08-CR-004 and 08-CR-074 are denied TR II, 22-23.

Following the evidentiary hearing, both sides submitted memoranda of law, and the trial court found no conflict. TR II, 18, 33, 40.

The case was again appealed, and the conflict issue was raised. In its opinion, designated to be published, a new panel of the Court of Appeals explained that when a defendant raises the alleged conflict at or before trial as an issue, the standard an appellate court follows is the one set out in Holloway v. Arkansas, 435 U.S. 475 (1978). COA Opinion, pg. 7-9. Holloway instructs that to prevail on a Sixth Amendment, right to counsel challenge based on a conflict of interest that was raised at or before trial, a defendant need only show that his counsel had a conflict of interest. Id. No showing of actual prejudice is required, and reversal is automatic when the defendant shows that his counsel had a conflict. Id.[5]

As described by the Court of Appeals panel, the trial court did not seem to follow this standard and was not entirely clear in its order, but it appears to have based its conclusion that no conflict existed in part on the erroneous notion that there was no simultaneous representation because the Paducah DPA's representation of Mr. Gravett terminated eight days before Mr. Samuels' trial. Id. at 9.

The Court of Appeals panel found that the trial court was incorrect in finding there was no simultaneous representation. Id. at 9-10. The panel pointed out that the right to counsel "attaches during the initiation of adversary judicial criminal

[5] The reasoning for an automatic reversal rule is because it is often difficult, if not impossible, to determine whether a conflict impacted counsel's performance throughout the course of the criminal proceedings. See infra, n. 6.

proceedings." Id. at 9 quoting Montejo v. Louisiana, 556 U.S. 778, 802 (2009) (internal quotation marks and citations omitted). The panel concluded that "[i]f an actual conflict existed during the critical investigatory phase of Samuels's trial, it could not have been erased by the mere fact that the simultaneous representation ceased on the eve of trial." Id. at 10.

The panel emphasized that the inquiry was supposed to be limited to determining whether a conflict existed. Id. at 8. The panel stated that a "conflict during representation arises from competing interests or duties that create the potential for prejudice." Id. at 11 citing Beard v. Commonwealth, 302 S.W.3d 643, 647 (Ky. 2010). The panel found that there were definitely competing interests between Mr. Samuels and Mr. Gravett due to Mr. Samuels being the defendant and Mr. Gravett being the alleged victim in the case. This is because "[t]he victim of a crime is not a detached observer of the trial of the accused." Id. at 11 quoting Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). Moreover, by statute, prosecutors are required to consult with the victim on the disposition of the case and victims can submit victim impact statements and receive restitution. Id. at 11 citing KRS 421.500, 532.030, and 532.350. The Court of Appeals panel concluded that "there are few interests more adverse in the criminal justice system than those of the accused and the victim." Id. at 12. Especially in the present case where the defendant was claiming self-defense. Id.

Having concluded that the interests of Mr. Samuels and Mr. Gravett were adverse enough to one another that a single lawyer could not have permissibly represented both at the same time, the question then became whether a conflict was imputed to the two

attorneys from the same DPA trial office representing Mr. Samuels and Mr. Gravett. Id. at 13-14.

The panel seemed to imply that this situation was a conflict under the Rules of Professional Conduct but stated that such rules are not constitutional guideposts and concluded that "[w]ithout a showing that the two attorneys collaborated or were involved in each other's cases during the relevant time period, we do not believe that the mere fact that they both worked for DPA is sufficient to prove that an actual conflict of interest existed under the Sixth Amendment." Id. at 16. The panel affirmed the trial court.

Thereafter, Mr. Samuels moved this Court to grant discretionary review of the case in part to provide guidance to the bench and bar regarding whether it is a conflict for a DPA attorney in a local DPA trial office to represent a defendant in a case while another DPA attorney in the same local DPA trial office represents someone with adverse interests in that same case on other criminal charges. This Court granted review. Mr. Samuels now respectfully requests this Court to reverse and remand the case for a new trial for the reasons stated herein.

ARGUMENT

A conflict warranting reversal occurred when a DPA attorney in a local DPA trial office represented a defendant in a criminal case while another DPA attorney in the same local DPA trial office represented the alleged victim in that same case on other criminal charges.

Preservation:

This issue is preserved. VR: 5/20/09;8:47:12, 8:48:00, VR: 9/23/11; 14:29:13, TR BA 33-38.

Prefatory Statement:

In its analysis, the Court of Appeals panel concluded that it would be a conflict for a single attorney to represent a defendant in a criminal case and to also represent the alleged victim in that case on separate criminal charges, especially when the defense in the case at issue is self-defense. COA Opinion, pg. 10, 13. The question then became whether that conflict was imputed to a local DPA trial office when a DPA attorney in that office represented a defendant in a case while another DPA attorney in the same local DPA trial office represented the alleged victim in that same case in another criminal proceeding.

Analysis:

A defendant's right to counsel is fundamental and the Sixth Amendment guarantees a defendant effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 344 (1963), Strickland v. Washington, 466 (1984). This "right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interest of his client." Von Moltke v. Gillies, 332 U.S. 708, 725 (1948). See also Mickens v. Taylor, 535 U.S. 162, 168 (2001), Holloway v. Arkansas, 435 U.S. 475, 482 (1978), Glasser v. United States, 315 U.S. 60 (1962). In other words, the right to effective assistance of counsel means that one has the right to conflict free counsel.

The rule of Holloway is that when appointed counsel has advised the appointing court "of the probable risk of a conflict of interests," and when "the judge [has] then failed either to appoint [other]... counsel or to take adequate steps to ascertain whether the risk was too remote to warrant [other] counsel," this failure "deprive [s the defendant]... of the guarantee of 'assistance of counsel'" and entitles the defendant to a

new trial with no need "to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion." 435 U.S. at 484, 489. The reasoning for an automatic reversal rule is because it is often difficult, if not impossible, to determine whether a conflict impacted counsel's performance throughout the course of the criminal proceedings.[6] Moreover, such a situation can likely cause a client, who feels his or her attorney is conflicted, to not consider the advice of counsel in the same meaningful way a client with confidence in his or her counsel would.

The situation in this case was preserved and is similar to the situation that occurred in Beard v. Commonwealth, 302 S.W.3d 643 (Ky. 2010). In Beard, a public defender was representing both a defendant in a criminal case and a witness for the Commonwealth. The defendant objected to the representation and this Court, in its Opinion reversing and remanding the case, stated:

> A conflict arises from competing duties or interests that create the potential for prejudice. The conflict does not come into being only when the potential turns into actual prejudice; it exists from the instant that inconsistent duties or interests arise.

Id. at 647.

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[6] This reasoning was explained in Holloway, 435 U.S. at 490-491 and quoted in COA Opinion, at 9:

> But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Again, unquestionably a conflict existed between the interests of Mr. Samuels and Mr. Gravett in the case at bar. Infra, n. 9. In support that a conflict in representation existed, Mr. Samuels pointed to, and still points to, the Rules of the Supreme Court, specifically the Kentucky Rules of Professional Conduct. While this conflict was somewhat different from the one in Holloway, as this Court said in Beard "ultimately, a conflict is a conflict." 302 S.W.3d at 646.

In concluding its analysis on appeal in the case at bar, the Court of Appeals panel seemed to imply that the Rules of Professional Conduct, violations of which can give rise to judicial ethics disciplinary proceedings against lawyers, may be applicable to the situation in the case at bar. COA Opinion, pg. 14. Yet, the panel stated that it would not weigh in on the issue and that reversal was not required because such rules do not define the scope of the Sixth Amendment. Id. The panel relied on Nix v. Whiteside, 475 U.S. 157 (1986) for that proposition. Id.

The panel's reliance on Nix in order to affirm a conviction was misplaced. Nix actually supports the proposition that ethical rules should be used to provide guidance regarding an attorney's constitutional duty to a client under the Sixth Amendment. In Nix, a client told his attorney shortly before trial that he was planning on committing perjury. 475 U.S. at 161. The attorney indicated to the client that he would seek to withdraw from representation if the client insisted on committing perjury. Id. The client went to trial, did not commit perjury, and was convicted. Id. at 162. Thereafter, the client accused the attorney of ineffective assistance of counsel under the Sixth Amendment for admonishing him not to commit perjury. Id. The United States Supreme Court, giving great weight to the canons and rules that an attorney shall not knowingly

use perjured testimony, found that the attorney did not fail to adhere to reasonable professional standards that would constitute a deprivation of the Sixth Amendment right to counsel and held as a matter of law that the attorney's conduct did not establish prejudice under the second strand of the Strickland inquiry.[7] Id. at 171, 175. The Court noted in its analysis that the ethical rule at issue was derived from an articulation of centuries of accepted standards of conduct. Id. at 166-167.[8]

In the case at bar, the rules regarding basic conflicts should be considered for guidance, just as the ethical rules in Nix were, because they are there to prevent clients from being represented by conflicted counsel and clients have the fundamental right to conflict free counsel. The conflict rules at issue in the case at bar are commonsense rules regarding adverse interests. These principles are not odd, state specific, ambiguous rules subject to significant change. The relevant sections of the rules at issue simply state: "a

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[7] The Court, at 475 U.S. at 164-165, set forth the standard of review in ineffective assistance of counsel cases, which is a different standard than that in the case at bar, as follows:

> In Strickland v. Washington, [466 U.S. 668 (1984),] we held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. To show such error, it must be established that the assistance rendered by counsel was constitutionally deficient in that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S., at 687, 104 S.Ct., at 2064. To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial. Id., at 694, 104 S.Ct., at 2068.

[8] The Court of Appeals panel's citation to West v. People, 341 P.3d 520 (Colo. 2015) in support of affirming the conviction was also misplaced because West was a case in which there was no objection, and there was an objection in this case, and because West involved a post-conviction allegation of ineffective assistance of counsel. Basically, the Court of Appeals panel affirmed the conviction in reliance on dicta from cases in which an objection was not made and that relied on a different standard than the standard involved in the case at bar or involved an issue in no way similar to the issue in the case at bar. In Spence v. Commonwealth, 727 S.E.2d 786 (Va. App. 2012), one of two other cases cited by the panel, an attorney was withdrawn from the case because of a threat made by Spence; however, no objection to a conflict regarding the replacement attorney was made. The other case cited by the panel, State v. Montgomery, 997 N.E.2d 579 (Ohio. App. 2013), has nothing to do with the issue involved in the case at bar and involved an attorney disclosing information after being accused of ineffective assistance of counsel after a client unsuccessfully tried to withdraw a guilty plea.

lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if... the representation of one client will be directly adverse to another client" and "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7..." SCR 3.130 (1.7)(a)(1) and (1.10)(a) (see infra, at n. 9 and 10 for full texts).

That these are commonsense rules not subject to significant change is reflected by the fact that the relevant sections of the rules at issue and quoted above are the exact same as ABA Model Rules of Professional Conduct, Rule 1.7 and 1.10. Moreover, the first sentence of the first comment to SCR 3.130(1.7) as well as the ABA Model Rule 1.7 states "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." Furthermore, as far back as 1648, the duties of an advocate, according to Lord Commissioner Whitelock, "consist in three things; secrecy, diligence and fidelity." "Secrecy" was described "as a duty to act as someone to whom a client could "lay open his evidences, and the naked truth of his case," "diligence" as the requirement to give "a constant and careful attendance and endeavor in his clients' causes," and "fidelity "as a duty to as someone "the client trusts with his livelihood." Tom Smith, Zealous Advocates: The Historical Foundations of the Adversarial Criminal Defense Lawyer, Vol 2 Issue 1, 1, 7-8 (March 2012) citing Ross Cranston, Legal Ethics and Professional Responsibility, 6 (Clarendon Press, 1995). Also, it would seem inconsistent to find that a client was represented by conflicted counsel under such rules but provide the client, who has lost his or her liberty, no relief due to having had conflicted counsel because clients have the right to conflict free counsel.

Again, the Rules of the Supreme Court, specifically the Kentucky Rules of Professional Conduct, and the ABA Model Rules cited above, provide guidance demonstrating that a conflict in representation occurred in the case at bar. Under SCR 3.130 (1.7) and ABA Rule 1.7, and under relevant case law, a conflict in interests existed in this case[9] and under SCR 3.130(1.10) and ABA Rule 1.10 such conflicts are imputed to lawyers "associated in a firm."[10]

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[9] SCR 3.130(1.7) (emphasis added) states:

> (a) Except as provided in paragraph (b), **a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**
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> **(1) the representation of one client will be directly adverse to another client; or**
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

Moreover, as stated by the Court of Appeals panel at COA Opinion, pg. 12:

> "The victim of a crime is not a detached observer of the trial of the accused." Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). This is especially true in the Commonwealth of Kentucky where we have a victim's rights statute, Kentucky Revised Statutes (KRS) 421.500, which requires, among other things, for the prosecution to consult with the victim "on the disposition of the case including dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program." KRS 421.500(6). Moreover "[a] victim has the right to submit a 'victim impact statement' pursuant to KRS 421.520, and the trial court must consider that statement 'prior to any decision on the sentencing... of the defendant.'" Hoskins v. Maricle, 150 S.W.3d 1, 26 (2004).

A local DPA trial office is a law firm. Comment 1 to SCR 3.130(1.10) and SCR 3.130(1) itself states that "firm" includes an "association authorized to practice law" and "lawyers employed in a legal services organization." The full text of SCR 3.130(1)(c) states as follows:

> "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

Under KRS 532.032, the trial court also has the authority to order the convicted defendant to pay restitution to the victim in criminal cases.

[10] SCR 3.130(10) (emphasis added) states:

(a) **While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7** or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1. 6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) A firm is not disqualified from representation of a client if the only basis for disqualification is representation of a former client by a lawyer presently associated with the firm, sufficient to cause that lawyer to be disqualified pursuant to Rule 1.9 and:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no specific part of the fee therefrom; and

(2) written notice is given to the former client.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

This definition of "firm" is the exact same definition found in the ABA Model Rule 1.0. In further consideration of what constitutes a firm, the Comment to SCR 3.130(1), as well as the Comment to the ABA Model Rule 1.0 (emphasis added) states:

> (2) Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. **Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.**
>
> (3) With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.
>
> (4) Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization **or different components of it may constitute a firm or firms for purposes of these Rules.**

Again, Mr. Samuels' assertion in the case at bar is that attorneys in the component of the same local DPA trial office, and not the agency as a whole, constitute a firm for the conflict provisions of the aforementioned rules.

A quick overview of the DPA should provide useful context for this Court. The DPA is "an independent agency of state government... [established] in order to provide for the establishment, maintenance and operation of a state-sponsored and controlled system for... [t]he representation of indigent persons accused of crimes or mental states which may result in their incarceration or confinement; and... [t]he pursuit of legal, administrative, and other appropriate remedies to ensure the protection of the rights of persons with disabilities, independent of any agency that provides treatment services, or rehabilitation to the persons with disabilities." KRS 31.010.

The DPA is attached for administrative purposes to the Justice and Public Safety Cabinet and is reviewed and assisted by the Public Advocacy Commission. Id. and KRS 31.015. The Commission submits to the Governor three nominees for appointment as the Public Advocate. KRS 31.015(6)(a). Under the Public Advocate are the Deputy Public Advocate and the General Counsel as well as five distinct divisions: Protection and Advocacy Division, Division of Trial Services, Division of Post-Trial Services, Education and Strategic Planning Branch, and Division of Law Operations. Each division is further divided. The division at issue here, the Division of Trial Services is further divided into six distinct branches: Western Regional Trial Branch, Bluegrass Regional Trial Branch, Northern Regional Trial Branch, Eastern Regional Trial Branch, Central Regional Trial Branch, and the Capitol Trial Branch. These six branches are even further divided into subcomponent trial offices of, respectively, five offices, six offices, nine offices, seven offices, six offices, and two offices for a total of thirty-five distinct trial offices. (See chart attached in appendix). In FY 2015, the number of attorneys in these offices ranged from 4 to 22 and in FY 2008 (the year of the indictment

in the case at bar) the number of attorneys in these offices ranged from 4 to 16. DPA Publications: DPA 2015 Annual Report, pg. 11-12 and DPA 2008 Annual Report, pg. 16.[11] In FY 2015 the Paducah office had 10 attorneys and in FY 2008 it had 12. Id.

Under the rules regarding conflicts, each distinct trial office is a firm in the context of conflicts. Each consists of "lawyers in [an]... association authorized to practice law" or "lawyers employed in a legal services organization." SCR 3.130(1)(c) and ABA Model Rule 1. Moreover, "it is relevant... to consider the underlying purpose of the Rule that is involved." Comment 2 to SCR 3.130(1) and ABA Model Rule 1. In the case at bar, the rules involved are the rules regarding conflicts of interests and these rules are extremely important because they are in place to prevent detriment to individual clients. And in criminal cases, the detriment involved is typically the loss of liberty. In other words, the harm involved is relevant to the inquiry. As the Comment states, "[a] group of lawyers could be regarded as a firm for the purposes of the Rule that the same lawyer should not represent opposing parties in litigation while it might not be so regarded for the purposes of the Rule that information acquired by one lawyer is attributed to another."

That a local DPA trial office is a firm is also supported by the Kentucky Bar Association. The Kentucky Bar Association, in Ethics Opinion KBA E-242 (May 1981) dealt with the issue of whether two public defender's in the same office could represent clients with conflicting interests. The answer was "no." The question in that case was:

[11] These reports can be accessed at http://dpa.ky.gov/dpapub.htm. These statistics do not include the number of attorneys for the Louisville-Jefferson County Public Defender Corporation due to its incorporated status as an entity separate from DPA. Also, the highest number of attorneys in a particular DPA trial office (22 in Lexington in FY 2015) is a bit of an outlier because the next highest number is 14.

> May one attorney in a single public defender or public advocacy office represent a criminal defendant, and another attorney in the same law office, who is also a public defender, represent another criminal defendant in a single case in which the defendants are jointly charged but neither has affirmatively waived the right to separate counsel pursuant to RCr 8.30?

Again, the answer was "no." While this opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990, similar ethical principles were in effect at that time. In that opinion, the underlying conflict principles used were that "a lawyer shall neither accept employment or continue multiple employment if it is likely to require his representation of differing interests" and "differing interests" was defined as "including every interests that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interests." These are similar to the current rules which state that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if... the representation of one client will be directly adverse to another client; or... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." SCR 3.130(1.7)(a).

In any event, the important finding in that opinion relevant to the case at bar is the finding that a conflict was imputed to two different lawyers associated within the same DPA office.

In resolving the issue at bar, it is also worth considering, that often a trial office may only have one secretary and investigator and the KBA, in Ethics Opinion KBA E-406 (November 20, 1998), under the current rules, has found that two or more lawyers

who share office space and often represent clients with adverse interests cannot share a legal secretary and that two law firms that often represent clients with adverse interests cannot employ the same legal secretary. This is due, in part, to the need to prevent access to and the sharing of confidential information about clients who have conflicting interests. The opinion also found that the same principles would apply to other nonlawyer employees of attorneys. This is also important because often a DPA trial office may only have, if any, one investigator.

The bottom line in the case at bar is that there was a conflict, even under principles that can be traced back for centuries, and Mr. Samuels was entitled to conflict free counsel, which he did not feel he had. He should not have been forced to go to trial under these circumstances.

Conclusion:

Mr. Samuels and the alleged victim had adverse interests that would have precluded the same attorney from representing both individuals. Each was represented by an attorney in the same DPA trial office and, as set forth above, the conflict was imputed to each attorney. Mr. Samuels objected to his representation prior to trial. Accordingly, under Holloway, supra, reversal for a new trial is required.

CONCLUSION

For the reasons stated herein, Appellant respectfully requests that this case be reversed and remanded to the McCracken Circuit Court for a new trial.

Respectfully Submitted,

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